

**LODI CITY COUNCIL
SPECIAL CITY COUNCIL MEETING
CARNEGIE FORUM, 305 WEST PINE STREET
TUESDAY, DECEMBER 9, 2003**

A. CALL TO ORDER / ROLL CALL

The Special City Council meeting of December 9, 2003, was called to order by Mayor Hansen at 7:06 a.m.

Present: Council Members – Beckman, Hitchcock, Howard, Land, and Mayor Hansen

Absent: Council Members – None

Also Present: Deputy City Manager Keeter, City Attorney Hays, and City Clerk Blackston

B. REGULAR CALENDAR

- B-1 "Discussion regarding proposed audit (agreed-upon procedures) of Envision Law Group's billings and authorization to execute contract with Barger & Wolen LLP"

Mayor Hansen reported that the Council Communication for this item included the following exhibits (all filed):

- Exhibit A – Staff report for Item I-1 on the November 19 City Council agenda;
- Exhibit B – List of references for Barger & Wolen;
- Exhibit C – Letter dated November 25 from Barger & Wolen to Larry Hansen confirming the terms under which the law firm has been retained by the City of Lodi to render legal services;
- Exhibit D – Facsimile dated November 26 from Barger & Wolen to Larry Hansen regarding the proposed legal fee audit; and
- Exhibit E – Letter dated December 5 from Barger & Wolen to Larry Hansen regarding disclosure of potential conflicts of interest.

Mayor Hansen noted that John Meyer of Envision Law Group had submitted a 13-page document (filed), which disputes Barger & Wolen's opinion on its potential conflicts of interest.

In reply to Council Member Land, Mayor Hansen reported that he and Council Member Hitchcock called all 11 references and with the exception of a few who they were unable to reach, each gave very favorable responses regarding the firm of Barger & Wolen and specifically of Robert Levy and David McMahon. Mr. Hansen stated that one of the questions he asked when he checked the references was whether they were aware of any adverse attorney-client relationship or indication of misconduct by Barger & Wolen and all of them adamantly replied that they were not aware of any such situation.

Council Member Land referenced Exhibit D, page 2, first paragraph and read, "To outline some of our assumptions, first, we believe that enough money probably is already available to fund the necessary cleanup..." Mr. Land pointed out that the scope of the site or cost of cleanup had never been determined and he asked how Barger & Wolen could know this information.

Mayor Hansen explained that the firm believed, from a cursory review of the situation, that the City appears to be on the right track in terms of pursuing the insurance companies and that money from the insurance companies could likely be collected and applied toward the cleanup.

Council Member Hitchcock added that, in speaking with other attorneys, they had indicated that the City's strategy in the litigation is not uncommon and there should be more than adequate funds to clean up the contamination. She noted, however, that in Lodi's case funds are being used up at an alarming rate for legal fees.

Robert Levy of Barger & Wolen explained that the assumption was based on his experience in similar cases involving Potentially Responsible Parties and insurance coverage over a number of years. The amount of insurance is usually adequate to do the cleanup that would satisfy the regulators. There is usually no wish of any claimant to go beyond the insurance assets. Further, he explained that this type of situation is normally considered property damage within the meaning of the term as used in the coverage grant of most commercial, general policies. He expressed his opinion that, as a general matter, they will be able to and they will be legally called upon under the right circumstances, to fund cleanup dollars.

Mayor Hansen read the end of the sentence Mr. Land had referred to, "...so long as unnecessary transaction costs can be avoided." He pointed out that this is one of the issues to be determined by the audit, i.e. whether the transactions the City has been billed for were reasonable and necessary.

Council Member Howard referenced Exhibit C, page 4, and noted that it requires a retainer of \$10,000; however, when this matter was discussed at a previous meeting \$50,000 was requested for retaining the services of Barger & Wolen.

Mayor Hansen reported that the audit could end up costing \$100,000 or more. He explained that Barger & Wolen's standard retainer is \$10,000; however, his intent in originally requesting \$50,000 was to give them enough money to complete a substantial amount of the audit without the constraint of continually coming back for additional funding.

Council Member Howard asked that, in the future, full disclosure regarding the cost be explained at the initial time of discussion. She asked how long the audit was anticipated to take.

David McMahon of Barger & Wolen replied that there were a variety of different approaches and the time needed to conduct the audit would depend on Council's objectives. He mentioned that if retained, Barger & Wolen would like to communicate with USF&G in an effort to obtain results of the audit it is conducting, which could potentially result in a significant cost savings to the City. If Council wishes that results be available prior to the trial date in January, it would not be possible to conduct a complete line item audit. He explained that when conducting line item audits Barger & Wolen often hires an independent expert to work with them who has sophisticated software with various report capabilities such as identifying trends, etc. The outcome of line item audits is very specific; however, it takes much longer (at least three months) and is more expensive.

In answer to questions posed by Council Member Howard, Mr. McMahon stated that the firm never hires experts without conferring with the principal and making sure it is in agreement with any potential conflict of interest issue or associated cost, which is typically between 1% and 3% of the face value of the bills. Mr. McMahon stated that regular status reports could be given to Council, either oral, written, or both. Mr. Levy added that status reports would be provided at Council's direction based on its preference. In reference to the hourly rates listed on Exhibit C, page 6, Mr. McMahon explained that the need for multiple people to work on the audit at the same time would depend on how soon Council needs the results. Currently it is structured with Mr. Levy and Dawn Valentine working on the Lehman Brothers financing agreement and Mr. McMahon, Mr. Haupt, and paralegals working on the Envision audit. If results were needed prior to January 12, more assistance would be needed to work on the Envision audit. He explained the complexity and time-consuming nature of a comprehensive audit, which would determine such things as whether or not the effort and resultant cost expended to produce a certain work product was appropriate.

Council Member Howard asked that Council have an opportunity to consult with its legal team before giving permission to contract with any other firm to assist in the audit, to which Mr. McMahon agreed.

Mayor Hansen reported that he had met with Mr. Levy and Mr. McMahon on five occasions, at which he shared public documents and discussed various strategies. He anticipated making a progress report about the audit at each regularly scheduled Council meeting until it is concluded. He hoped to have a cursory overview report prior to the January trial date.

John Meyer of Envision Law Group referenced Exhibit E noting that Barger & Wolen had reported a number of conflict disclosures. He stated that there was a difference of opinion with respect to the nature and extent of the conflicts and whether they could be cleared. He explained that his memorandum details Envision's analysis of the conflicts in a very specific way to allow Council an opportunity to evaluate the nature of each conflict and how the Rules of Professional Conduct play out in that context. He stated that some of the conflicts clearly can be waived; however, one cannot. It is Envision's view that the Council would be best served by obtaining an audit and report generated by a firm that has solely the City's interest at heart. He explained that 'fiduciary relationship' is a standard evaluated in the attorney-client context in two different regards: 1) duty of confidentiality, and 2) duty of loyalty. The law provides an assessment of whether or not conflicts are actual, or whether they are potential. Under California law, potential and actual conflicts are generally treated similarly. The general rule is that once the client is provided with full disclosure it can choose to waive a conflict. There are situations in the actual conflict setting where the courts have differed from the general rule provided in the Rules of Professional Conduct and said that under no circumstances, as a matter of law, can such a waiver be granted because it comprises the duty of loyalty. Mr. Meyer stated that even if Council were to sign a consent, the courts would deem it invalid, because Barger & Wolen would be representing both the City of Lodi and a party adverse to the City in litigation. He believed it would be inappropriate for Council to proceed without first obtaining the advice of counsel on the question of conflicts. He reviewed Exhibit E, Barger & Wolen's disclosure of potential conflicts of interest. He claimed that as an attorney on behalf of the Chubb group (specifically, Federal Insurance that is still a party to the Hartford litigation) Barger & Wolen has existing duty of loyalty whether the action is stayed or not. The claim expenses component is the portion of the retention that is being discussed with Barger & Wolen, which would be at issue. In reply to Mayor Hansen, Mr. Meyer confirmed that this was the conflict that he felt could not be waived.

In answer to Council Member Hitchcock, Mr. Meyer reported that, in the trial commencing in January, determinations of liability would be made in the M&P investments actions at which point the question of indemnity under the City's insurance policies would be able to be addressed by Judge Kramer in the Hartford matter. The Superior Court would then proceed with the insurance coverage litigation. He explained that the indemnity question in the insurance litigation is typically stayed until the liability determinations are made in the underlying action.

Mayor Hansen read from Exhibit E, page 2, "Nevertheless, in a superabundance of caution, should the City decide to retain Barger & Wolen in connection with the proposed representation, we will terminate our representation of Federal in the cleanup litigation."

Mr. McMahon disclosed that Ethan Miller, an attorney with Barger & Wolen, has represented Pacific Indemnity Company and Federal Insurance Company. In an excess of caution Barger & Wolen would terminate that representation and put an ethical wall in place within the firm wherein Mr. Miller and any associate that may have assisted him on the case would be screened off and not be involved in any way with the representation of the City's interest. He urged Council to consult with an independent lawyer to resolve the issue if there is a difference of opinion. He reiterated his belief that the conflict could be waived if representation of Federal was terminated and an ethical wall was put in place, to which Mr. Levy expressed concurrence.

In answer to Mayor Pro Tempore Beckman, Mr. Levy stated that the work product, which would be reviewed as part of the audit, are public documents and he did not believe that access to anything other than public records would be necessary.

Council Member Howard noted that the contract from Barger & Wolen mentions that after an audit has been completed the firm would represent the City of Lodi in any legal proceedings over any concerns that may come about. She asked whether this would then shift the area of conflict of interest.

Mr. Meyer answered that it would be a separate, but related analysis. He stated that the relevant question is whether there is concurrent representation where the work to be performed fundamentally leads to adverse positions being taken. He stated that the withdrawal from representation of Federal would not cure the conflict. He urged Council to contact the State Bar's hot line and get the opinion of its ethics lawyer about whether it is an actual concurrent representation that is not waivable, or if terminating Federal would make it a former representation, and if they are clear of the "hot potato" rule such that they can undertake this representation subject to an appropriate waiver. Another option would be for Council to provide authorization for its attorneys to move to disqualify and raise this issue before Judge Kramer who would resolve the issue. Addressing Council Member Hitchcock, Mr. Meyer reported that none of the funds that have been used since 1999 have been, or would be, available for anything other than the litigation process. Neither the defense duty money from USF&G, nor money obtained from Lehman Bros., would provide funding for the cleanup.

Council Member Hitchcock clarified that her concern was that an alarming amount was being spent for litigation costs.

Mr. Meyer pointed out that Barger & Wolen stated that it would like to speak with opposing counsel (i.e. USF&G) in a litigated matter in order to address its review of the bills, which he felt highlighted the duty of loyalty question.

Mr. Levy explained that the motive and goal in contacting USF&G was to look at the results of its audit, and in essence, to use it as salvage to save the City money. Whether this occurs would be at Council's discretion. In reference to the Hartford action, Mr. Levy asked them if they would be comfortable with allowing Barger & Wolen to withdraw from it and they agreed on two provisos: 1) that Barger & Wolen disclose the nature of what its representation would be for the City, and 2) that Barger & Wolen would agree that it would not take the City's representation and sue Federal, Chubb, or Pacific to try to get policy proceeds. Mr. Levy stated that the firm has never been asked to do that, nor if it were asked, would it agree to. Further, he stated that the firm does not "fire" clients for the purpose of taking more lucrative assignments and consequently does not believe it is running afoul of the "hot potato" case as Mr. Meyer previously alluded to.

Mayor Hansen stated that the City Council representing the citizens of Lodi is the client in this case. He believed it is Council's obligation and duty to pursue an audit of Envision Law Group because of the issues that have been raised by citizens and the media.

In answer to Mayor Hansen, Mr. Levy clarified that it is not that Barger & Wolen would not be representing any of these entities forevermore; it may represent AIG Environmental, for example, in completely unrelated matters. Mr. Levy confirmed that it would not provide representation to any firm, with respect to anything having to do with the litigation in which the City is involved.

Mayor Hansen commented that as he and Council Member Hitchcock began interviewing attorneys and looking closer into the Lincoln case it became evident that there were disputes about billings and concern that they were starting to run out of money for the cleanup. In that case the judge stepped in and took action that stopped some of the billings and processes that were taking place.

Council Member Hitchcock expressed concern that the current path leads only to the continued addition of attorneys' fees and litigation costs, with no end in sight to get to cleanup of the contamination.

MOTION:

Council Member Hitchcock made a motion, Beckman second, to authorize the Mayor to execute the contract with Barger & Wolen LLP for the initial audit of Envision Law Group's billings.

DISCUSSION:

Council Member Land hoped that Council would first get a ruling from a third party attorney about the conflict of interest issue before moving forward on this matter.

Mayor Hansen stated that he would contact the State Bar, present the issue from both perspectives, and get another opinion.

Council Member Howard believed that there was a conflict of interest with Barger & Wolen. She noted that only one firm was interviewed regarding its background and qualifications in the area of auditing. Council has an opportunity to interview additional firms and find one that can unequivocally say it has no conflict. She believed that would be the wise decision and therefore would not be voting in favor of the motion.

Mayor Hansen expressed his opinion that it is a significant advantage that Barger & Wolen was involved with many other attorneys in the overview of the billings from the Lincoln case and he believed it would be very prudent for Council to take advantage of this experience.

Council Member Hitchcock agreed that there is a huge benefit to hiring a firm that has already had experience with Envision Law Group and believed that it would significantly reduce the "learning curve."

Mayor Pro Tempore Beckman pointed out that the City currently has USF&G as its insurance carrier that owes a duty to defend. The City also currently has Envision Law Group that is prosecuting cases for the City. Both of these firms owe an ethical duty to the Council and the City of Lodi and yet they are adverse to each other, i.e. USF&G is investigating Envision Law Group. Bringing one more firm in that owes an ethical duty to the City, that may or may not have conflicts with someone else, he did not see as any different than the situation that currently exists.

In reply to Deputy City Manager Keeter, Mayor Hansen stated that he would meet with Barger & Wolen to determine the best approach to undertake with regard to the audit. He would then report back to Council and allow an opportunity for further input. He confirmed that he would contact the State Bar and discuss the conflict issues that were raised this morning.

VOTE:

The above motion carried by the following vote:

Ayes: Council Members – Beckman, Hitchcock, Land, and Mayor Hansen

Noes: Council Members – Howard

Absent: Council Members – None

C. COMMENTS BY THE PUBLIC ON NON-AGENDA ITEMS

None.

D. ADJOURNMENT

There being no further business to come before the City Council, the meeting was adjourned at 8:35 a.m.

ATTEST:

Susan J. Blackston
City Clerk